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Securing access to climate change technologies

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“Securing access to climate change technologies: insights from the intellectual property/human rights interface”

“Climate Change in the Courts: Emerging Patterns”

University of Edinburgh
13 November 2009
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Overview

- Climate Change and Intellectual Property
- Lessons from IP, human rights and essential medicines
- Possible routes forward



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IP and Climate Change

- IP is NOT the same as technology
 - trade secrets, expertise
- BUT technology can be the subject of IP
 - gives the IP owner the right to control the use of the technology
 - reward for innovation
- EVEN IF WIDE ACCESS TO THE TECHNOLOGY IS IMPORTANT FOR UNFCCC GOALS



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Limits of IP

- NOT an unfettered right
- Patents
 - novel and inventive
 - 20 years
 - national
 - controls the invention, nothing else
- Patent litigation often very boring...
- BUT if there are no other options, problem for climate change
 - Agenda 21
 - Chatham House
 - Barton,RIS,ICTSD



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Power of IP

- TRIPS – must have patents
- **MAY** have more limits
 - compulsory licensing, research exemption, import
 - TRIPS
 - IP should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge (article 7)
 - members may adopt measures necessary to promote the public interest in sectors of vital importance to their socio-economic and technological development, **provided that such measures are consistent with the provisions of this Agreement.** (article 8)
- Limited exploration
 - US opposition - eg Jordan Free Trade Agreement
 - US Special 301
 - what does it mean...fuels WTO challenge to legislation
 - Canada



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Conflicts

- Private power and public obligations
- NOT THE FIRST TIME



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IP and essential medicines

- Never the twain shall meet....
- Post TRIPS, the battle for access
 - South African legislation (1997)
 - settled case
 - Oxfam et al
 - WTO declaration (2001) and decision (2003)
 - WHO Commission (2003-6)



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Working around IP

- Confirms there can be restrictions on it
 - but not mandatory
- Seeks other forms of encouraging innovation
 - eg Malaria Project
- Conflict not addressed
 - a new tool?



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The human rights contribution

- International, regional and national instruments
 - life, health
 - property, reward
 - most have own limits
- UN Sub-Commission resolutions 2000/7 and 2001/21
 - limited legal teeth
 - call for engagement with WTO
 - General Comment article 15(1)(c) ICESCR
- A new angle in WTO challenges
 - Shrimp
 - cf Biotech



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More courts – more direct contribution?

- International human rights monitoring..
 - limited teeth
 - limited interest so far
- ECtHR: Budweiser and Smithkline (ECHR)
- National IP actions
 - Levi (IP win) and Ashdown (more open) (England, HRA)
 - balance in IP, and two sets of human rights (with limits)
 - Harper & Row (IP win) cf Wind Done Gone (expression win) (US, constitution)
 - Laugh it Off (expression win)(South Africa, constitution)



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Lessons from Health

- IP owners have power and supporters want to keep it that way
 - Bangkok, Barcelona
 - Senate letter
 - ACTA
- If there is no other technology, consider competition
- A Declaration on Climate Change technologies?
 - teeth only in WTO cf regime shift
 - need compulsory licensing mandatory
 - health experience suggests this is unlikely



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Lessons from Climate Change

- Health has no equivalent to EGTT
 - eg proposed Multilateral Fund, new forms of innovation, arrangements for transfer
- A more public focus - Aarhus
- Much greater interaction
 - EPO/ICTSD/UNEP
- Persist....



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- THANK YOU



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